IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30-03-2007

Coram:

THE HONOURABLE MR. JUSTICE P.K.MISRA
AND
THE HONOURABLE MR.JUSTICE J.A.K.SAMPATH KUMAR

Writ Appeal No.2271 of 2000

The Southern Railway
rep. by its Chairman,
Chennai .. Appellant/2nd Respondent

Versus

1. S.Ponnusamy ..Respondent/Petitioner

2. The State of Tamil Nadu,
rep. by the
Additional Secretary to Government,
Transport Department,
Fort St.George, Chennai-600 009.

3. Thavamani Pandian
Deputy Chief Engineer,
Southern Railway, Salem.

4. Veerappa Gounder

5. Jagadeesan .. Respondents/3 to 5 respondents

Prayer: This Writ Appeal is filed under Clause 15 of the Letters Patent, against the order, dated 7.4.2000 in W.P.No.13301 of 1999 passed by the learned single Judge of this Court.

WP 13301/99: This Writ Petition filed under Art.226 of the constitution of India to issue a writ of Certiorari calling for the impugned orders passed by the first respondent in G.O.Rt.172 Transport Department dated 1.6.1999 issued under section 4 of the Land Acquisition Act as published in Malai Murasu dated 12.6.1999 and G.O.Rt.No.196 Transport Department dated 2.7.1999 issued under section 6 of the Land Acquisition Act as Published Malai Murasu dated 16.7.1999 in so far as they relate to acquisition of 0.28.5 acres in Sruvey No.470/12B, 0.01.5 acres of land in Survey No.471/8A,0.05.0 acres of land in Survey No.471/9B and 0.04.5 acres

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of land in Survey No.471/10B and 0.04.5 acres of land in Survey No.471/11B of Komavarampatti Village, Namakkal Town, Namakkal Taluk belonginging to the petitioner, quash the same.

For Appellant : Mr.R.Thiagarajan, SC for
Mr.V.G.Suresh Kumar

For Respondents : Mr.V.Selvaraj for R1
Mr.P. Subramani, G.A. for R2

J U D G M E N T

P.K. MISRA, J

The Southern Railway has filed this appeal against the decision of the learned single Judge rendered in W.P.No.13301 of 1999, whereunder, the learned single Judge allowed the Writ Petition filed by the respondent No.1 and quashed the 4(1) Notification as well as declaration made under Section 6 of the Land Acquisition Act, seeking to acquire the lands belonging to respondent No.1.

2. The brief facts are as follows:

The Notification under Section 4(1) of the Land Acquisition Act, 1984 (hereinafter referred to as 'the Act') was issued by the State Government on 1.6.1999 for acquisition of certain lands for the Southern Railway. Enquiry under Section 5-A of the Act was dispensed with by invoking the urgency clause and declaration under Section 6 was made on 2.7.1999.

3. Respondent No.1 filed W.P.No.13301 of 1999 seeking to quash the Notification under Section 4(1) and the declaration under Section 6 of the Act, so far as they relate to the acquisition of 0.28.5 ares of land in S.No.470-12B, 0.01.5 ares of land in S.No.471/8A, 0.05.0 ares of land in S.No.471/9B, 0.05.0 ares of land in S.No.471/10B and 0.04.5 ares of land in S.No.471/1B of Kosavampatti village, Namakkal town, Namakkal taluk, belonging to respondent No.1.

4. The main contention raised in the Writ Petition was to the effect that initially, the railway authorities had decided to acquire the lands of 4th and 5th respondents in the above said Writ Petition (4th and 5th respondents in the present appeal) for the purpose of laying a railway line, but subsequently, with *mala fide* view, to safeguard the interest of the 4th and 5th respondents, the alignment was altered, which resulted in proposed acquisition of the lands belonging to the writ petitioner (present respondent No.1). It was further contended that the acquisition should be made in public interest and by changing the original alignment and by

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acquiring the land of the writ petitioner, public interest would not be subserved.

5. Counter affidavit was filed on behalf of the Southern Railway which had been arrayed as 2nd respondent in the said writ petition, while denying the allegations relating to the alleged *mala fides*, it was pointed out that the alignment was required to be changed as the cost for acquisition would have become much higher on the account of the fact of existence of many constructions for which compensation would have been payable in case the the appellant would have proceeded as per the original alignment. It was further stated that in such area coming within original alignment, many houses had been constructed by the Tamil Nadu Housing Board and therefore, the number of persons to be affected would have been much more. It was further stated as under in para 8:

> "8. ... all the essential aspects of the case were meticulously studied by all the officers of the railway administration at different levels and only on application of mind and subjective satisfaction the new alignment was finally approved and put into action. In the other alignments considered there were many business constructions and workshops and also poultry farms. But in the instant case there is least disturbance and is all a vacant land excepting a few houses. The present alignment now finalised and put into action is highly economical. It is close to the town thereby the general public are favouring this alignment. It is unfortunate that the present writ petitioner, who was present throughout during the demarcation and fixing of the boundary at ones should choose to file this writ proceeding after a period of 15 months and he was silent spectator throughout. The acquisition of lands including that of the writ petitioner has been done purely on public interest and no mala fides can be attributed. As already submitted only 9 RCC houses and 5 tiled buildings are affected as against 105 RCC houses and 33 tiled buildings in the preliminary survey. Apart from the above, about 6.97 crores had been saved now in view of the new alignment."

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6. Further affidavits were filed on behalf of the appellant clarifying certain aspects. Counter affidavit was also filed on behalf of the 5th respondent, denying the allegation of *mala fide*.

7. In the course of hearing before the learned single Judge, various alignments suggested from time to time had been

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produced. Even though the learned single Judge negatived the pleading of mala fides, held that proposed alignment No.2 was preferable to the proposed alignment No.5, which had been selected by the Railways. It was further concluded that permanency of the Railway line and economy of maintenance should have been kept in view while selecting the alignment and the Railway authority had "not satisfactorily explained as to why alignment No.5, which has got two bends, should have been selected in preference to a straight line."

8. On the basis of the above said conclusion, even though the learned single Judge had negatived the plea of *mala fides*, quashed the declaration under Section 6 as well as the Notification under Section 4(1) of the Act. Hence the present appeal.

9. The learned senior counsel appearing for the appellant has submitted that once the learned single Judge came to the conclusion that the allegations of *malafides* had not been proved, the Court should not have quashed the declaration by coming to the conclusion that alignment No.2 would be beneficial to the Railways in the long run. It is submitted that the decision of the Railway authorities to prefer alignment No.5 was based on consideration of relevant facts and circumstances and after making study and research and the High Court should not have substituted its own wisdom for that of the Railways while dealing with such a question in a Writ Petition under Article 226 of the Constitution.

10. The learned counsel appearing for the contesting respondent No.1 has submitted that the conclusion of the learned single Judge was based on thorough consideration and discussion of the relevant facts and figures produced before the learned single Judge and there is no illegality in such conclusion. The learned counsel has further submitted that the Railway authorities have subsequently issued a Notification under Section 48-B of the Act, withdrawing from the land acquisition and therefore, the appeal itself had become infructuous and liable to be dismissed.

11. The submission of the learned senior counsel for the appellant on this latter aspect is to the effect that such Notification has been subsequently quashed by the High Court in a Writ Petition filed by others

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12. The first question is relating to the merits of the case. It is apparent that the learned single Judge has not accepted the contention of the writ petitioner (respondent No.1) to the effect that the decision of the Railway authorities to change the alignment and adopt alignment No.5 for laying the railway line was vitiated by the *mala fides*. We have also independently gone through the various allegations and counter allegations on such aspect and

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we see no reason to come to a different conclusion. In other words, it cannot be said that the Railway authorities adopted alignment No.5 for an oblique motive.

13. Once such a conclusion is arrived at, the next question is whether the learned single Judge was justified in interfering with the administrative decision of the Railway authorities to adopt a particular alignment for laying the railway track.

14. The law on such aspect is well settled. The High Court while dealing with such matters does not sit as an appellate authority over the administrative conclusion of an administrative authority.

15. In (1996)9 SCC at 709 (TATA IRON & STEEL CO.LTD versus UNION OF INDIA AND ANOTHER), it was observed as under in para 68.

> "68. At this juncture, we think it fit to make a few observations about our general approach to the entire case. This is a case of the type where legal issues are intertwined with those involving determination of policy and a plethora of technical issues. In such a situation, courts of law have to be very wary and must exercise their jurisdiction with circumspection for they must not transgress into the realm of policy-making, unless the policy is inconsistent with the Constitution and the laws. . . ."

16. In a decision of the Hon'ble Supreme Court, reported in (2000)8 SCC 262 (NETAI BAG AND OTHERS v. STATE OF W.B. AND OTHERS), it was observed in para 19 as under:

> "19. Though the State cannot escape its liability to show its actions to be fair, reasonable and in accordance with law, yet wherever challenge is thrown to any of such action, initial burden of showing the prima facie existence of violation of the mandate of the Constitution lies upon the person approaching the court. ...
>
> 20. The Government is entitled to make pragmatic adjustments and policy decision which may be necessary or called for under the prevalent peculiar circumstances. The court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or wiser or more scientific or logical. In *State of M.P.* v. *Nandlal Jaiswal* it was held that the policy decision can be interfered with by the

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court only if such decision is shown to be patently arbitrary, discriminatory or mala fide.

17. In (2001) 3 SCC 635 (UGAR SUGAR WORKS LTD. Versus DELHI ADMINISTRATION AND OTHERS), it was observed as under in para 18:

> "18. The challenge, thus, in effect, is to the executive policy regulating trade in liquor in Delhi. It is well settled that the courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. However, if the policy cannot be faulted on any of these grounds, the mere fact that it would hurt business interests of a party, does not justify invalidating the policy. In tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference, to judgment of the executive. The courts are not expected to express their opinion as to whether at a particular point of time or in a particular situation any such policy should have been adopted or not. It is best left to the discretion of the State. "

18. There are several decisions of the Hon'ble Supreme Court emphasising similar views and it is not necessary to burden this judgment by referring to all such decisions. It can be only reiterated that it is a well settled principle of law that while dealing with such matters, the Courts should not interfere with the conclusion of the authorities based on technical and other assessment merely because in the opinion of the Court, some other course of action would be more beneficial and the Courts should desist from such interference, unless the Courts come to the conclusion that the decision of the administrative authority is perverse and arbitrary and no reasonable man of ordinary prudence could have come to such a conclusion.

19. In the present case, the learned single Judge himself has concluded that alignment No.2 and No.5 were two possible alternatives. The Railway authorities decided to opt for alignment No.5 on the basis of the consideration of relevant aspects and it cannot be said that their conclusion was based on consideration of irrelevant materials or perverse and arbitrary requiring Court's interference. In such view of the matter, the learned single Judge should not have interfered with the discretion exercised by the Railway authorities in deciding to proceed with the construction of the railway line by adopting alignment No.5. Such conclusion of the learned single Judge, is, therefore, liable to be interfered with.

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20. The next question is relating to the effect of subsequent notification issued by the State Government.

21. Such notification is issued in G.O.Ms.No.164 Transport, dated 3.12.2003. This Notification purports to be 'withdrawal notification under the Land Acquisition Act' and is extracted as under:

> "Under Sub-section 48-B of the Land Acquisition Act, 1894 (Central Act of 1894), the Governor of Tamil Nadu hereby withdraw from acquisition of lands specified in the Schedule below in respect of the Notification under Sub-section (1) of Section 4 of the said Act approved in their G.O.Ms.No.172, Transport (I-I), dated 1st June 1999-published in the *Tamil Nadu Government Gazettee* Extraordinary (No.452), dated 4th June 1999 in Part II-Section 2, pages 1 to 4 and Declaration under Sub-section 6 of the said Act in their G.O.Ms.No.196, Transport (I-I), dated 2nd July 1999 published in the *Tamil Nadu Government Gazettee* Extraordinary (No.543), dated 7th July 1999 in Part-II-Section 2, pages 3 to 5 as being required for a public purpose to wit for the formation of Salem-Karur Broad Guage Railway Line
> Project in Kosavampatti village in Namakkal taluk in Namakkal District."

22. The above Notification purports to be issued under Section 48-B of the Act as amended by the Land Acquisition (Tamil Nadu Amendment) Act, 1996 (Tamil Nadu Act 16/1997).

Section 48-B is extracted hereunder:

> "48-B. Transfer of land to original owner in certain cases.-
>
> Where the Government are satisfied that the land vest in the Government under this Act is not required for the purpose for which it was acquired, or for any other public purpose, the Government may transfer such land to the original owner who is willing to repay the amount paid to him under this Act for the acquisition of such land inclusive of the amount referred to in sub-section (1-A) and (2) of Section 23, if any, paid under this Act."

23. Even though the Notification purports to be one under Section 48-B, the language used in the Notification prima facie appears to be more compatible with the provisions contained in

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Section 48 which empowers the Government to withdraw from acquisition of any land of which, possession has not been taken. Be that as it may, such Notification was challenged by the other land owners whose lands were acquired and such Writ Petition was allowed by the High Court and the appeal filed by the Railways was dismissed, as apparent from the decision of the Division Bench in (2005)2 CTC 721 (Southern Railways, rep. by its Chief Engineer (Construction), Egmore, Chennai v. S.Palaniappan and others). In the said Division Bench decision, it was observed that Section 48-B does not contemplate any unilateral withdrawal from acquisition, but a notification under Section 48-B can be issued only after obtaining the consent of the erstwhile land owners. This conclusion was reached by the Division Bench obviously because under Section 48-B, the land which is vested in the Government is not required for the purpose for which it was acquired, can be reconveyed to original owner who is willing to repay the amount paid to him under the Act.

24. It is the contention of the learned senior counsel for the Railways that since such notification purportedly issued under Section 48-B has been quashed, it must be taken that there is no such notification in the eye of law and it is still open to the Railway authorities to take action in accordance with law.

25. In (2003) 1 SCC 335 (NORTHERN INDIAN GLASS INDUSTRIES v. JASWANT SINGH & OTHERS), wherein it was observed :-

> "12. If the land was not used for the purpose for which it was acquired, it was open to the State Government to take action but that did not confer any right on the respondents to ask for restitution of the land. As already noticed, the State Government in this regards has already initiated proceedings for resumption of the land. In our view, there arises no question of any unjust enrichment to the appellant Company."

26. Such decision was referred to and followed in a subsequent decision of the Supreme Court in (2005) 1 SCC 558 (GOVT. OF A.P. v. SYED AKBAR) wherein it was observed :-

> "10. It is neither debated nor disputed as regards the valid acquisition of the land in question under the provisions of the Land Acquisition Act and the possession of the land had been taken. By virtue of Section 16 of the Land Acquisition Act, the acquired land has vested absolutely in the Government free from all encumbrances. Under Section 48 of the Land Acquisition Act, Government could withdraw from the acquisition of any land of which possession has not been taken. In the instant case, even

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under Section 48, the Government could not withdraw from acquisition or to reconvey the said land to the respondent as the possession of the land had already been taken...."

It was further observed:-

14. From the position of law made clear in the aforementioned decisions, it follows that (*1*) under Section 16 of the Land Acquisition Act, the land acquired vests in the Government absolutely free from all encumbrances; (*2*) the land acquired for a public purpose could be utilised for any other public purpose; and (*3*) the acquired land which is vested in the Government free from all encumbrances cannot be reassigned or reconveyed to the original owner merely on the basis of an executive order."

27. On an analysis of Section 48 of the Act and the decisions of the Supreme Court, it is apparent that the right of the Government to withdraw from the acquisition of any land as contemplated under Section 48 is not absolute, but circumscribed by certain contingencies. Such power can be exercised only if possession has not been taken or if the matter does not come within Section 36.

28. It is obvious that power under Section 48 can be exercised only when possession has not been taken. Where, however, possession has been taken and the land has vested with the State Government, no such statutory right is vested with the State Government. If the land is not required for the purpose acquired, it would be always open to the State to use the and for some other public purpose.

29. Section 48-B, which has been introduced by (Tamil Nadu Amendment) Act, 1996 (Act XVI of 1997), however, empowers the State Government to transfer such land to the original owner. Before exercising the option of reconveyance, the Government is required to be satisfied that the land vested in it is not required for the purpose for which it was acquired or for any other public purpose. The provision also contemplates that the Government may transfer such lands to the original owner, who is willing to repay the amount paid to him. In other words, it is obvious that such land can be returned to the original owner provided he is willing to repay the amount and not otherwise. Therefore, there cannot be any unilateral decision by the Government to return the land to the original owner. This is precisely the view expressed by the Division Bench already referred to.

30. A comparative analysis of Section 48 and Section 48-B,

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introduced by way of amendment in Tamil Nadu, makes it clear that once possession of the land and consequent vesting as envisaged under Section 16 takes place, there is no scope to withdrew from the land acquisition as envisaged under Section 48 of the Act. On the other hand, Section 48-B is applicable only after the land has vested with the Government.

31. The relevant file relating to G.O.Ms.No.164 has been produced. On a perusal of such file, it appears that initially, there was a proposal for withdrawal from the land acquisition as contemplated under Section 48(1) of the Land Acquisition Act. However, it was opined that since the lands were taken possession of and the land owners had received compensation, the question of withdrawal under Section 48(1) does not arise. It was, therefore, suggested at that stage, that the provisions contained in Section 48-B can be considered. Such opinion was given by the Special Commissioner and Commissioner of Land Administration, on the basis of letter, dated 1.12.2003 sent by the railway authorities. The railway authorities intended to abandon the project as the cost of acquisition was assuming astronomical proportion on account of the fact that the compensation had been enhanced by the Sub Judge in Reference under Section 18 of the Act. The letter of the Southern Railway indicates that the Railways requested to take necessary action to re-convey the vacant land under Section 48-B to the erstwhile owners and accordingly, it appears that notification purporting under Section 48-B has been issued. Though the wordings of the Notification are not entirely in accordance with Section 48-B, keeping in view the request of the Railways, it can be safely concluded that the Notification issued is one under Section 48-B, which Notification has been quashed by the High Court at the instance of other land owners as apparent from the Division Bench decision already noted above.

32. The learned counsel appearing for respondent No.1, submitted that since respondent No.1 was not a party to the Writ Petition which was decided by the High Court, respondent No.1 cannot be held to be bound by such decision and so far as he is concerned, the Notification can be still held to be subsisting. On the other hand, the learned senior counsel for the Railways submitted that since the validity of the Notification was in question and since the High Court has quashed such notification, it must be taken that there is no such Notification in existence.

33. In our opinion, it is not necessary to consider as to whether the decision of the Division Bench ultimately quashing the notification is binding on the present respondent No.1 or not. In our opinion, even assuming that such decision is not binding on respondent No.1, he does not derive any benefit. As already stated, the above said Notification purports to be one under Section 48-B of

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the Act and from the correspondence made by the Railways, it is apparent that the Railway authorities intended to invoke the provisions under Section 48-B to re-convey the land. So far as respondent No.1 is concerned, it is not disputed that the possession of the land had not been taken by the Railways and obviously, therefore, his land had not vested with the Railways. Since respondent No.1 has challenged the land acquisition proceedings, the award in respect of his lands has not been passed nor he has received any compensation thereof. Section 48-B contemplates re-conveyance of the lands to the erstwhile land owners, whose lands had been acquired. So far as respondent No.1 is concerned, the land is yet to be acquired by taking possession. Therefore, even if it is held that the quashing of the Notification at the instance of other affected persons is not applicable to the case of respondent No.1, there is no question of applying the provisions of Section 48-B to his case. The very same notification, which was apparently issued under Section 48-B, cannot be construed as one under Section 48(1) so far as Respondent No.1 is concerned. Therefore, it is still open to the Railway authorities and the State to complete the process of land acquisition so far as property belonging to respondent No.1 is concerned.

34. In the course of hearing, the learned counsel for respondent No.1 has submitted that since the award has not been made within the period stipulated, it must be taken that the Notification under Section 4(1) and the declaration under Section 6 have lapsed.

35. Section 11-A, which was introduced by Act 68 of 1984, enjoins the Collector to make award under Section 11 within a period of two years from the date of publication of the declaration and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse. The explanation, however, makes it clear that in computing the period of two years, the period during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a Court shall be excluded.

36. From the materials on record, it is apparent that while the writ petition was pending, there was no order of stay. Subsequently, the learned single Judge had quashed the land acquisition proceedings and obviously, therefore, the authorities including the State could not have proceeded further to complete the award enquiry within the stipulated period. Once the Writ Petition was allowed, till such matter is decided otherwise in appeal, obviously, neither the Railway Administration nor the State Government could have proceeded to complete the acquisition proceedings by finalising the award so far as the Respondent No.1 is concerned.

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Thereafter, the writ appeal was filed by the Railway on 12.6.2000. However, only by order dated 15.12.2000, there was an interim stay of the operation of the order of the learned single Judge for a period of 12 weeks. Thereafter, there has been no order extending such interim order of stay. Even assuming that the authorities could have proceeded with the award enquiry during the period of 12 weeks commencing from 15.12.2000, by virtue of the interim order staying the operation of the order of the learned single Judge, in the absence of any subsequent order extending such interim order of stay or passing any fresh order of stay, the Railway authorities and the State could not have proceeded further. It is thus apparent that out of two years available to finalise the award from the date of declaration under Section 6, the authorities were only free to continue the proceedings under Section 11 from 2.7.1999 till 7.4.2000 and for a further period of 12 weeks from 15.12.2000 and the authorities were obviously not in a position to proceed with the award because the order of the learned singe Judge quashing the declaration under Section 6 is operative till now. Such entire period is liable to be excluded. Therefore, at this stage, it cannot be said that no award can be passed so far as respondent No.1 is concerned within the stipulated period of two years. It is, however, made clear that if ultimately award is passed, beyond the stipulated period, at that stage, such a question can be re-agitated.

37. The learned counsel for respondent No.1 further submitted that since the land acquisition proceedings had been quashed by the learned single Judge and was withdrawn by the State Government, the local Planning Authority had granted planning permission to respondent No.1 for construction of school building and respondent No.1 has established a school by putting an additional construction at his cost. So far as this aspect is concerned, we are convinced that appropriate legal and equitable relief should be granted to respondent No.1. Law is well settled that compensation is required to be paid for the acquired property on the basis of the market value as on the date of Notification under Section 4(1) of the Act. It is also further well settled that if structures are existing, the valuation also should include the value of the structures existing on the date of 4(1) Notification. However, if any construction is made unauthorisedly after the publication of Section 4(1) notification, obviously, the owner cannot claim compensation for such unauthorised structures. In the present case, the claim of respondent No.1 is that structures have been erected after obtaining necessary permission after the disposal of the writ petition and the issuance of the proceedings under Section 48-B. If that be so, obviously respondent No.1 would be entitled to compensation by ascertaining the valuation thereof which is obviously is a matter which should be enquired at the stage of award enquiry and if respondent No.1 is aggrieved, he has to take

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recourse to Section 18 of the Act for making a reference. It is only made clear that if any construction has been made by respondent No.1 after decision of the learned single Judge or the date of withdrawal notification, such valuation should be ascertained and paid to respondent No.1.

38. In the result, the Writ Appeal is allowed and the order, dated 7.4.2000 in W.P.No.13301 of 1999 passed by the learned single Judge is set aside, subject to the observations made above. There would be no order as to costs of the present appeal.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

The Additional Secretary to Government,
The State of Tamil Nadu,
Transport Department,
Fort St.George, Chennai-600 009.

+1cc to Govt. Pleader, SR 20578
+1cc to Mr.V.G.Suresh Kumar, Advocate Sr 20839
+1cc to Mr.V.Selvaraj, Advocate Sr 20969

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